Supreme Court, U.S.
FILED
JUN 29 1999
OFFICE OF THE CLERK

No. 98-1959

IN THE
SUPREME COURT OF THE UNITED STATES

RICHARD WAINSCOTT,
Petitioner,

v.

MEDUSA AGGREGATES COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an individual with chronic low back syndrome who is borderline mentally retarded, functionally illiterate, has a sixth grade education, had throughout his employment history worked only in those jobs requiring heavy lifting capacity and, as a result, who is deprived of a substantial number of real work opportunities, is a "disabled" individual within the meaning of the Americans With Disabilities Act ("ADA"), 42 U.S.C. §12112(a)?

PARTIES TO THE PROCEEDING

Petitioner

Richard Wainscott

Respondent

Medusa Aggregates Company

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The Opinion of the United States Court of Appeals for the Sixth Circuit is reported at 1999 U.S. App. LEXIS 6273. A copy of the Opinion is included in the Appendix at App. A, 1a. The Opinion of the District Court for the Eastern District of Kentucky is unreported and a copy of the Opinion is included in the Appendix at App. B, 8a.

JURISDICTION

The United States Court of Appeals for the Sixth Circuit issued its Opinion on April 1, 1999. This Petition for Writ of Certiorari is filed within 90 days of the filing of the Opinion. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §§1254(1) and 2106.

STATUTORY PROVISIONS INVOLVED

Americans With Disabilities Act
42 U.S.C. §12112(a)

(a) General Rule. No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

Americans With Disabilities Act
42 U.S.C. §12102(2)

(2) Disability. The term "disability" means, with respect to an individual -

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

STATEMENT OF THE CASE

The facts of this case are uncomplicated and undisputed. Petitioner, Richard Wainscott, suffers from chronic low back syndrome. Wainscott was, when this litigation commenced, 55 years old. He had a sixth grade education and was functionally illiterate. The evidence demonstrated that he had always been employed in jobs requiring heavy or very heavy lifting. Wainscott began working for Respondent, Medusa Aggregates Company, in 1979. He began as a laborer and later became employed as a haul unit driver at one of Respondent's limestone quarries.

While working as a haul unit driver, Wainscott developed a lower back problem. On March 9, 1995, his doctor discovered that two vertebrae were out of alignment. Wainscott reported his back problem to Respondent, but continued to work as a haul unit driver without incident until October, 1995. In October, 1995, Wainscott's doctor, Dr. Floyd Poore, reported to Respondent that Wainscott should discontinue working as a haul unit driver. Therefore, as a result of his injury, Petitioner was unable to perform the heavy lifting jobs that were the source of his livelihood. Wainscott then sought transfer to the vacant position of laborer. Respondent refused the requested accommodation.

On October 28, 1996, Petitioner filed a Complaint in the United States District Court, Eastern District of Kentucky, claiming that the denial of accommodation violated the Americans with Disabilities Act, codified at 42 U.S.C. §12112, et seq. (hereinafter "ADA"). Wainscott claimed that his permanent back problem qualified as a "disability" under the ADA and that Respondent's failure to accommodate him violated the ADA. Wainscott offered evidence that established that he was disqualified from all jobs in the "heavy" and "very heavy" classes of jobs. Respondent's expert agreed that Wainscott could not perform any jobs in the "heavy" and "very heavy" job classes. Throughout his work life, Wainscott had only worked in those jobs in the heavy or very heavy job classes. Thus, for Richard Wainscott, this permanent back injury substantially impaired his ability to work. Petitioner sought, among other relief, compensatory damages resulting from Respondent's failure to accommodate.

The District Court had jurisdiction over the original action pursuant to 28 U.S.C. §1331 because the case presented a federal question arising under the ADA. On February 2, 1998, Respondent filed a Motion for Summary

Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, claiming that the evidence presented did not set forth sufficient facts whereby a reasonable jury could conclude that Respondent engaged in any unlawful acts alleged in Petitioner's complaint. Despite substantial evidence from which a reasonable jury could conclude that Wainscott had a disability within the meaning of the ADA, the District Court granted Respondent's Motion for Summary Judgment on the sole ground that Petitioner's impairment did not rise to the level of a disability within the meaning of the ADA. The District Court entered judgment on April 7, 1998.

Wainscott timely appealed to the Court of Appeals for the Sixth Circuit. On April 1, 1999, the Court of Appeals affirmed the District Court's judgment. Ignoring the facts, legislative history, the EEOC's Interpretive Guidance, cases under the Rehabilitation Act, and cases from other Circuits under the ADA, the District Court held that Wainscott's injury could not, under any set of circumstances, be severe enough to fall under the protection of the ADA. The District Court and the Court of Appeals reasoned that Wainscott's impairment disqualified him only from a "narrow range of jobs" and, therefore, was not a disability under the ADA.

ARGUMENT FOR GRANTING WRIT

In enacting the ADA, Congress intended to protect over 43 million Americans with disabilities.[1] The protections

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[1] See, Cong. R. - Senate, September 7, 1989, p. S.10714, Remarks of Sen. Hatch, noting that the ADA "really enfranchises 43 million Americans ...." See also, Cong. R. - House, 101st Cong., 2d Sess., May 17, 1990, p. H.2483; Remarks

of the ADA are not intended to safeguard the rights of just those people in wheelchairs. Consistent with the Congressional intent, the EEOC has established that a physical impairment substantially limits an individual's ability to work if it prevents or significantly restricts the individual from performing a class of jobs or a broad range of jobs in various classes. See, EEOC Technical Assistance Manual, Volume II, EEOC Order 915.002 (March 14, 1995). In fact, in its Technical Assistance Manual, the EEOC has specifically noted that "a charging party is substantially limited in working if (s)he has a back impairment that precludes him/her from heavy lifting and, therefore, from the class of heavy labor jobs." The EEOC's position has been adopted by those courts which have directly considered the issue. See, Webb v. Garelick Manufacturing Co., 94 F.3d 484 (8th Cir. 1996).[2] This Court's recent decision in Bragdon v. Abbott, 524 U.S. 624, 118 S.Ct. 2196 (1998) is consistent with the EEOC's position, as this Court noted that "the Act addresses substantial limitations on major life activities, not utter inabilities." Id., at 2206. The Court in Bragdon also recognized that deference to the EEOC's position was appropriate in construing the breadth of the ADA. Id., at 2209. The Sixth Circuit, from which this case has been appealed, also has noted that the EEOC's Interpretive Guidance is controlling unless plainly erroneous or inconsistent with the regulations. See, e.g., Gilday v. Mecosta County, 96 F.3d 830, n. 2 (6th Cir. 1997). Thus,

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of Rep. Conte, stating that "this bill is a declaration of independence for 43 million disabled Americans".

[2] See also, Cochrum v. Old Ben Coal Co., 102 F.3d 908, 911 (7th Cir. 1996), recognizing EEOC definition of "heavy duty jobs" as a "class of jobs" for purposes of deciding if a person is substantially limited in ability to work.

both Congressional history and the EEOC's interpretation compel a construction of the term "disability" that entitles Wainscott to the protection of the ADA. Neither the District Court nor the Court of Appeals attempted to distinguish the EEOC's position in any way. Rather, both Courts simply ignored the EEOC's clear language.

Additionally, this Court noted in Bragdon that the ADA's definition of disability, which is drawn almost verbatim from the definition of "handicapped individual" in the Rehabilitation Act of 1973, indicates Congress' intention that the term be construed according to prior regulatory interpretations. It is also well settled in the Sixth Circuit that the ADA is to be interpreted consistently with the Rehabilitation Act of 1973. See, Maddox v. University of Tennessee, 63 F.3d 843, 846 (6th Cir. 1995); Monette v. Electronic Data Systems Corp., 90 F.3d 1173, 1177 (6th Cir. 1996). See also, House of Representatives Report No. 101-485 (Part 3) (101st Cong., 1st Sess., August 30, 1989), p. 21. Under the Rehabilitation Act of 1973, case law established that an individual was substantially limited in his ability to work and, hence, entitled to the protection of the Rehabilitation Act, when a back impairment disqualified the worker from employment in the heavy and very heavy exertional classes. See, e.g., E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088 (D. Hawaii 1980). See also, Perez v. Philadelphia Housing Authority, 677 F. Supp. 357 (E.D. Pa. 1987), affirmed, 841 F.2d 1120 (3d Cir. 1988).

It is clear that the lower courts' decisions to deny Petitioner protection under the ADA is inconsistent with legislative history, the EEOC's interpretation of the Act, case law under the Rehabilitation Act, and cases from other Circuits under the ADA. The need for judicial guidance from

this Court is critical. This case presents a question of vital national importance and application.

ARGUMENT 1

The decisions of the lower courts to deny Petitioner protection as disabled under the ADA is contrary to the EEOC's interpretation of the Act.

The lower courts' failure to recognize Petitioner as disabled under the ADA conflicts with the EEOC's interpretation of the ADA. In order to have a "disability" under the ADA, an individual must have a (1) physical or mental impairment that (2) substantially limits one or more of the individual's major life activities. 42 U.S.C. §12102(2). The ADA's implementing regulations define the term "physical or mental impairment" broadly, including, inter alia, any physiological disorder or condition significantly affecting a major bodily system, e.g., the musculoskeletal system. See, 45 C.F.R. §84.3(j)(2)(i)(A). Respondent stipulated that it regards Wainscott as having a physical impairment. Likewise, the uncontradicted medical evidence proved that Wainscott had chronic low back syndrome, which is an impairment of the musculoskeletal system. Thus, the sole issue was whether this physical impairment substantially limited Wainscott in a major life activity.

The ADA does not define the term "major life activities," but regulations promulgated by the EEOC to implement Title I of the ADA provide guidance as to that definition. 29 C.F.R. Part 1630; See, 42 U.S.C. §12116 (requiring the EEOC to issue regulations to implement Title I of the ADA). See also, School Board of Nassau County v. Arline, 480 U.S. 273, 279 (1987) (treating Rehabilitation Act

regulations promulgated by the Department of Health and Human Services as "an important source of guidance on the meaning of 504 [of the Rehabilitation Act]"). The ADA regulations adopt the definition of "major life activities" found in the Rehabilitation Act regulations. 34 C.F.R. §104(c); 29 C.F.R. Part 1630, Appendix to Part 630 - Interpretive Guidance on Title I of the Americans With Disabilities Act, 1630.2(i), Major Life Activities. The term "major life activities," as defined in the regulations, means:

> Functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

See, 29 C.F.R. §1630.2(i). In the case at bar, Wainscott contended that he was substantially limited in the major life activity of "working."

The regulations define the term "substantially limits" as:

> (i) unable to perform a major life activity that the average person in the general population can perform; or
>
> (ii) significantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average

> person in the general population could perform that same major life activity.[3]

The EEOC's Technical Assistance Manual unequivocally follows the broad legislative interpretation of the term "disability" and clearly covers Wainscott's impairment. The Technical Assistance Manual, Volume II, prepared by the EEOC, EEOC Order 915.002, issued on March 14, 1995, states at page 3:

> An impairment substantially limits an individuals ability to work if it prevents or significantly restricts the individual from performing a class of jobs or a broad range of jobs in various classes.

Citing, Perez v. Philadelphia Housing Authority, 677 F. Supp. 357 (E.D. Pa. 1987), affirmed, 841 F.2d 1120 (3d Cir. 1988), holding that where a back injury substantially limited the jobs in which a person could engage, the person has a

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[3] The Appendix to the ADA regulations emphasizes the need to compare the individual claimant with the average person in the general population to determine if the person is "significantly restricted" in the "major life activity" involved. The Court must look to what effect the physical impairment has on the particular individual seeking ADA protection. See, McKay v. Toyota Motor Manufacturing, 110 F.3d 369, 371 (6th Cir. 1997) (In determining the effect of an impairment on the plaintiff's ability to work, plaintiff's educational background and age were relevant factors); Dush v. Appleton Electric Co., 124 F.3d 957, 963 (8th Cir. 1997) (In evaluating whether plaintiff was a qualified individual with a disability under the ADA, special attention must be given to circumstances surrounding the case). See also, 29 C.F.R. §1630.2, Appendix, at 403-04.

"disability" within the meaning of the ADA. The EEOC cited Perez with approval in its Technical Assistance Manual.[4]

The EEOC has also taken the position in its Interpretive Guidance that disqualification from all heavy duty jobs constitute being limited in performing a "class of jobs" within the meaning of the ADA. Being disqualified from such a class may constitute a disability. Webb v. Garelick Manufacturing Co., supra. See also, Cochrum v. Old Ben Coal Co., 102 F.3d 908, 911 (7th Cir. 1996) (recognizing the EEOC definition of "heavy duty jobs" as a "class of jobs").[5] Wainscott is precluded from performing all jobs in the class of heavy lifting jobs. By definition, therefore, he is substantially limited in his ability to perform the major life activity of working. The Sixth Circuit has held that the EEOC's Interpretive Guidance is binding unless plainly erroneous or inconsistent with the regulations. Gilday v. Macosta County, 96 F.3d 830, n. 2. See also, Harris v. H & W Contracting Co., 102 F.3d 516 (11th Cir. 1997) (granting "considerable weight" to EEOC guidelines in holding that a federal court cannot disregard interpretive guidance contained

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[4] The Sixth Circuit has also held that a physical impairment substantially limits the major life activity of working where it restricts the person's ability to perform a class of jobs or a broad range of jobs in various classes. See, e.g., McKay v. Toyota Motor Manufacturing, 110 F.3d 369, 372 (6th Cir. 1997).

[5] The Court in Cochrum also held that the District Court erred in assuming "that plenty of places would have employed Cochrum ... Given the breadth of his ... physical restrictions, a reasonable jury could conclude that Cochrum's physical impairment does substantially limit his ability to work." Id., at 911. Thus, the impairment must be viewed in terms of its impact on the employee's real work opportunities.

in the appendix prepared by the agency charged with enforcing the ADA).

In its Technical Assistance Manual, the EEOC specifically noted that "a charging party is substantially limited in working if (s)he has a back impairment that precludes him/her from heavy lifting and, therefore, from the class of heavy lifting labor jobs." Citing, E.E. Black, Ltd. v. Marshall, 497 F. Supp. 1088, 1102 (D. Hawaii 1980). No one disputed that Wainscott had a back impairment that precluded him from heavy lifting and, therefore, from the class of heavy lifting jobs.

By denying Petitioner protection under the ADA, the lower courts have contradicted the guidance of the EEOC's Technical Assistance Manual in construing the term "disabled." The EEOC's interpretation of the term "disability" is consistent with the language of the ADA and should have been followed. This Court has held that the EEOC's interpretation of the ADA's coverage is entitled to deference. Bragdon v. Abbott, 524 U.S. 624, 118 S.Ct.. 2196 (1998). The lower courts' decisions limit the definition of disability to only a narrow range of extremely debilitating impairments. By ignoring the EEOC's interpretation of the term "disability," the lower courts have emasculated the ADA as an effective protection against disability discrimination.

ARGUMENT 2

The decisions of the lower courts to deny Petitioner protection as disabled under the ADA is inconsistent with case law from other circuits.

The decisions of the lower courts to deny Petitioner protection under the ADA is contrary to case law from other circuits. Other Courts have held that proof of limitations similar to those suffered by Petitioner are sufficient to withstand summary judgment. In Cochrum v. Old Ben Coal Co., 102 F.3d 908, 911 (7th Cir. 1996), the Court held that "[t]he physical restrictions Cochrum's physician placed upon him - no overhead work, heavy lifting, or pulling and pushing out from his body - might apply to a broad range of jobs, and are more than job specific." In light of the breadth of Cochrum's physical restrictions, the Court therein held that "a reasonable jury could conclude that Cochrum's shoulder impairment does substantially limit his ability to work." Id.. Also, in Roush v. Weastec, Inc., 96 F.3d 840, 844 (6th Cir. 1996) the plaintiff provided evidence that she had a bladder condition that caused her such substantial pain that she could not work without medication. She also presented evidence that she needed to be treated by her physician monthly or semi-monthly for infections and pain. The Court held that, on those limited facts, the plaintiff had created a genuine issue of material fact as to whether her bladder condition substantially limited her working. See also, Pritchard v. Southern Company Services, 92 F.3d 1130, 1133-34 (11th Cir. 1996) (holding that it was a question of fact whether symptoms of depression, including profound fatigue and difficulty concentrating, substantially limited ability to work); Patterson v. Xerox Corp., 901 F.Supp. 274, 278 (N.D. Ill. 1995) (severe back pain held to qualify as a disability under

the ADA); Cehrs v. Northeast Ohio Alzheimer's Research Center, 155 F.3d 775 (6th Cir. 1998) (holding a question of fact existed as to whether psoriasis substantially limited plaintiff in major life activities); Downs v. Massachusetts Bay Trans. Auth., 13 F.Supp.2d 130, 138 (holding the determination of whether a given impairment is disabling is fact-intensive precluding summary judgment).

In a more recent case, the 8th Circuit Court of Appeals followed a similar analysis. Webb v. Garelick Manufacturing Co., 94 F.3d 484 (8th Cir. 1996). The Plaintiff in Webb was a director of purchasing whose duties involved significant writing and typing. He developed a condition known as focal dystonia, which was aggravated by writing and other repetitive, precision hand motions. The company doctor concurred with plaintiff's doctor that he could no longer write and could only type a little. In determining whether Webb had a "disability" within the meaning of the ADA, the Court of Appeals rejected the District Court's "sweeping holding ... that a plaintiff can never demonstrate disability as long as there is any other job that she can perform." 94 F.3d at 487. The Court of Appeals noted that a person was substantially limited in the major life activity of working if he or she is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities." 94 F.3d at 487, citing, 29 C.F.R. §1630.2(j)(3)(i). The Court noted that "[u]nder this broad definition of substantial limitation, an ADA plaintiff need not demonstrate that her impairment restricts her ability to perform all jobs. Rather, as the EEOC's interpretive guide to the Act illustrates, an individual is disabled when her impairment merely prevents performance of a certain class of jobs." Id.. Thus, the Court in Webb held as follows:

> An individual who has a back condition that prevents the individual from performing any heavy labor job would be substantially limited in the major life activity of working because the individual's impairment eliminates his or her ability to perform a class of jobs. This would be so even if the individual were able to perform jobs in another class, e.g., the class of semi-skilled jobs.

Id., citing, 29 C.F.R. Part 1630.2(j)(ii).[6] Clearly, the Sixth Circuit's decision conflicts with the Eighth Circuit's decision in Webb.

The Court in Webb noted that in determining whether a person is disabled, the person's expertise, background, and job expectations are relevant factors. 94 F.3d at 487. Accord, Jasany v. United States Postal Service, 755 F.2d 1244, 1249 (6th Cir. 1985). The Court noted, "[f]undamentally, the ADA is concerned with preventing substantial personal hardship in the form of significant reduction in a person's real work opportunities." Id., at 488. Thus, the Court must ask "**whether the particular impairment constitutes for the particular person a significant barrier to employment.**" Id., at 488, quoting, Forrisi v. Brown, 794 F.2d 931, 933 (4th Cir. 1986). See

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[6] The EEOC has likewise noted that the terms "number and types of jobs" as used in the Regulations "are not intended to require an onerous evidentiary showing. Rather, the terms only require the presentation of evidence of general employment demographics and/or of recognized occupational classifications that approximate number of jobs ... from which an individual would be excluded because of an impairment." Interpretive Guidance, App. §1630.2(j) at 340-41.

also, Homeyer v. Stanley Tulchin Associates, Inc., 91 F.3d 959 (7th Cir. 1996) (reversing grant of summary judgment where District Court failed to "undertake a meaningful analysis" of the individual's particular situation).

The Sixth Circuit's decision herein also conflicts with Mondzelewski v. Pathmark Stores, Inc., 162 F.3d 778 (3d Cir. 1998). The facts in Mondzelewski are strikingly similar to those presented herein. Mondzelewski was a 55 year old man with a sixth grade education. He suffered a back injury which restricted him from lifting objects weighing more than 50 pounds and carrying objects weighing more than 25 pounds. The District Court granted summary judgment for the employer, holding that Mondzelewski did not have a disability within the meaning of the ADA. The Court of Appeals reversed. The Court of Appeals held that, considering Mondzelewski's training, skills, and abilities, a reasonable jury could believe that, as to him, the back impairment substantially limited him in the major life activity of working. 162 F.3d at 786. The Court in Mondzelewski eschewed any bright line rules as to what impairments do or do not constitute a disability, holding:

> We accept this approach - under which an individual's training, skills, and abilities are taken into account in determining whether the individual is substantially limited in the major life activity of working - because we owe "substantial deference" to the EEOC regulation in which it is set out ... and because it is entirely reasonable. Indeed, because the effect that a particular impairment will have on a person's ability to work varies depending on that person's background and skills, it is not

> easy to envision how any other approach could be taken.

162 F.3d at 784. Followed, Whitfield v. Pathmark Stores, Inc., 39 F.Supp.2d 434 (D. Del. 1999) (Vacating prior grant of summary judgment in light of Mondzelewski).

In addition, the Seventh Circuit Court of Appeals held in DePaoli v. Abbott Laboratories, 140 F.3d 668 (7th Cir. 1998) that a woman who developed tendonitis and tenosynovitis in her right hand as a result of performing repetitive motions on her assembly line job had a disability which substantially limited her major life activity of working. The Court noted that the question of whether she had a disability with the meaning of the ADA, is "a individualized one, and must be determined on a case-by-case basis." Id., at 672. The Court held that DePaoli was suffering from a physiological disorder or condition that affected her musculoskeletal system - namely, her tendonitis and tenosynovitis. Id.. Therefore, the Court assumed the condition was sufficient to show that she had a "physical impairment" as the term was used in 42 U.S.C. §12102(2)(A) and 29 C.F.R. §1630.2(h)(1). Id.. The next question became whether DePaoli's impairment substantially limited any of her major life activities, namely her major life activity of working. The Court commented that the correct test of whether an impairment substantially limits the major life activity of working falls between two extremes. Id. On one hand, it would not be enough for an employee to establish that the disability prevented her from performing one particular job. Id.. On the other hand, an employer could not escape liability by showing that the employee is capable of generally performing some economically viable work in the national economy. Id.. The Court then cited the Appendix to Part

1630 as offering an example of a "class of job" under the statute:

> An individual who has a back condition that prevents the individual from performing any heavy labor job would be substantially limited in the major life activity of working because the individual's impairment eliminates his or her ability to perform a class of jobs. This would be so even if the individual were able to perform jobs in another class, e.g., the class of semi-skilled jobs.

Id., at 672-73.

The Court concluded that although DePaoli's hand was usable for less strenuous work, her preclusion from almost any assembly line job that required repetitive movement meant that she was effectively eliminated from performing a "class of jobs." Id. at 673.

Finally, in another Seventh Circuit case, Best v. Shell Oil Company, 107 F.3d 544 (7th Cir. 1997), the Court addressed the question of whether Best, a truck driver, was substantially limited in the major life activity of working due to a knee injury or whether the knee injury simply precluded him from performing one narrow job for one employer. 107 F.3d at 546. The Court held that a reasonable trier of fact could determine that Best's injured knee substantially limited his ability to work as a truck driver. Id.. The Court noted that although the record did not show how many truck driving jobs required the ability to operate a truck with a clutch or how often the painful configuration of the particular seat involved occurs, testimony suggested that it was not

uncommon. Id. This was enough, the Court concluded, to require a trial of that issue. Id..

Herein, all of the evidence (including Defendant's vocational expert. Dr. Luca Conte), established that Wainscott's back impairment precluded him from performing any jobs in the "heavy" and "very heavy" job classes. According to the EEOC in its Technical Assistance Manual, this evidence sufficed to create a genuine issue of material fact as to whether he had a disability within the meaning of the ADA. The Sixth Circuit's rejection of the EEOC's interpretation conflicts with decisions from the Third (Mondzelewski), Seventh (Cochrum and DePaoli), and Eighth (Webb) Circuits. This Court should accept review to reconcile this conflict.

ARGUMENT 3

The decisions of the lower courts to deny Petitioner protection as disabled under the ADA conflicts with case law under the Rehabilitation Act.

It is well settled that the ADA is to be interpreted consistently with the Rehabilitation Act of 1973. See, Maddox v. University of Tennessee, 63 F.3d 843, 846 (6th Cir. 1995); Monette v. Electronic Data Systems Corp., 90 F.3d 1173, 1177 (6th Cir. 1996). See also, House of Representatives Report No. 101-485 (Part 3) (101st Cong., 2d Sess., May 15, 1990, p. 27) and Senate Report No. 100-116 (101st Cong., 1st Sess., August 30, 1989, p. 21). Under the Rehabilitation Act, case law established that an individual was substantially limited in his ability to work and, hence entitled to the protection of the Rehabilitation Act, when a back impairment disqualified the worker from employment in the

heavy and very heavy exertional classes of jobs. See, e.g., E.E. Black, Ltd. v. Marshall, 497 F.Supp. 1088 (D. Hawaii 1980). See also, Perez v. Philadelphia Housing Authority, 677 F.Supp. 357 (E.D. Pa. 1987), affirmed, 841 F.2d 1120 (3d Cir. 1988). The lower court's decisions to deny Wainscott protection under the ADA contradicts case law decided under the Rehabilitation Act of 1973.

Under the Rehabilitation Act, it was well settled, prior to the adoption of the ADA, that the determination of "who is a handicapped person under the Act is best suited to a case by case determination." Forrisi v. Brown, 794 F.2d 931, 933 (4th Cir. 1986). Under the Rehabilitation Act, "[t]he inquiry is, of necessity, an individualized one - whether the particular impairment constitutes for the particular person a significant barrier to employment." 794 F.2d at 933. See also, Elstner v. Southwestern Bell Telephone Co., 659 F.Supp. 1328, 1342 (S.D. Tex. 1987). The Court must examine "the impaired individual ... and not just the impairment in the abstract." Perez v. Philadelphia Housing Authority, 677 F.Supp. 357, 360 (E.D. Pa. 1987), affirmed, 841 F.2d 1120 (3d Cir. 1988). See also, Trimble v. Carlin, 633 F.Supp. 367 (E.D. Pa. 1987) (Knee injury sustained at work constituted handicap). Thus, in Perez, the Court held that a plaintiff with low back syndrome was entitled to protection of the Act. 677 F.Supp. at 360-61(E.D. Pa. 1987). See also, Coley v. Secretary of the Army, 689 F.Supp. 519 (D. Md. 1987) (Osteoarthritis which restricted ability to do manual labor covered under Act).

It is apparent from the lower courts' rulings that they did not defer to settled case law under the Rehabilitation Act. Neither the District Court nor the Circuit Court of Appeals analyzed the effect of Wainscott's impairment on his ability to work, in view of his illiteracy and his work history. Rather,

both Courts simply implied that the effect on the particular individual is immaterial and that only the medical nature of the physical impairment determined whether Wainscott had a "disability" under the ADA. This approach is, simply put, wrong. The ADA, like its predecessor the Rehabilitation Act, commands an individualized determination. 42 U.S.C. §12102(2) states explicitly that the disability determination must be made "with respect to an individual." A back impairment of the type suffered by Wainscott could, conceivably, not qualify as a "disability" if Wainscott were a well-educated person with a sedentary work history. However, Wainscott is not a well-educated person with a sedentary work history. Richard Wainscott is functionally illiterate. He has a sixth grade education. Throughout his life, he has worked only in those jobs requiring heavy or very heavy lifting. Had the Courts below focused on the real effect of Wainscott's physical impairment, and construed all of the evidence in a light most favorable to him, the Courts below could have seen that a jury could reasonably have concluded that Wainscott had a physical impairment and that this physical impairment substantially limited him in the major life activity of working. Rather than considering whether as to this particular individual, the particular impairment constituted a significant barrier to employment, the Courts below seem to have focused on their perceived concern that, allowing protection for back injuries under the ADA would open up the flood gates of litigation. However, this concern is ill placed. For some individuals, a back injury will be an impairment. For some individuals, such as Richard Wainscott, a back injury should be a disability within the meaning of the ADA. For other individuals, however, a back impairment may have no effect on that person's ability to work. The District Court's and the Court of Appeals' decisions to deny protection failed to consider whether, for Richard Wainscott, his particular impairment constituted a

significant barrier to employment. The undisputed evidence established that Wainscott was barred from all jobs in the heavy and very heavy exertional job classes. As such, for him, this back impairment constituted a significant barrier to employment. He is, therefore, entitled to the protection of the ADA.

ARGUMENT 4

The decisions of the lower courts to deny Petitioner protection as disabled under the ADA is inconsistent with legislative history.

In denying Wainscott the protection of the ADA, the Courts below have frustrated the Congressional intent that the Act's definition of disability be broadly interpreted to encompass a wide-range of impairments, not just those traditionally associated with the word "disability." When enacted, the ADA was hailed as "landmark legislation." Cong. R. - House, 101st Cong., 2d Sess., May 17, 1990, p. H.2412; Remarks of Rep. Gordon, May ~~17~~, 1990. The ADA's chief sponsor, Senator Harkin of Iowa, commented on the floor of the Senate that the ADA was designed to protect "43 million Americans with disabilities." Cong. R. - Senate, September 7, 1989, p. S.10711. The ADA was intended to be broad in its protections, as Senator Harkin noted that it would protect "one out of every six of out citizenry." Id. It was intended to protect "[t]hose who are non-disabled by the conventional definition...." Id. Senator Hatch likewise noted that the ADA "really enfranchises 43 million Americans who have not had the type of co-equal treatment in our society that persons with disabilities really deserve." Id., p. S.10714. Senator Kennedy likewise commented that the bill was intended to protect 43 million individuals. Id., p. S.10717. Senator Armstrong of Colorado, a vociferous opponent of the

ADA, objected to the sponsors' statements regarding who the ADA protected. He commented: "What concerns me is the thought that this disability might include some things which by an ordinary definition we would not expect to be included...." Id., p. S.10753.

Senator Helms, elaborating on Senator Armstrong's comments, discussed the definition of "individuals with disabilities" and asked Senator Harkin, "[I]t must have been the intent of S.933's authors that it be an all encompassing bill; is that correct?" Senator Harkin responded, "[T]hat is correct." Id., p. S.10765. Expanding on this response, Senator Harkin explained the definition of disability under the ADA and stated " ... [W]e obviously could not restrict it [the definition of disability] and say just those people who use wheelchairs [are covered by the Act]. We had to cover all kinds of disabilities, mental as well as physical." Id., p. S.10768. See also, p. S.10783, in which Senator Humphrey complained that "we are not simply talking about the blind, the deaf, or persons confined to wheelchairs...."[7] Thus, Congress was well aware that it had adopted a very broad definition of the term "disability," and, in fact, intended to do so. Congress clearly did not intend that the ADA would protect only the blind, the deaf, or those confined to

---

[7] Likewise, in the House, Representative Conte stated that "this bill is a Declaration of Independence for 43 million disabled Americans." Cong. R. - House, 101st Cong., 2d Sess., p. H.2483. Congressman Armey, a vocal opponent of the ADA, complained that "the scope of this legislation is unprecedented. It defined disability so broadly that 43 million Americans, nearly one-fifth of the U.S. population, will be covered by it. That enormous number, of course, includes millions of people that most Americans would not consider disabled...." Cong. R. - House, 101st Cong., 2d Sess., May 17, 1990, p. H.2448.

wheelchairs. Indeed, Congress tacitly approved the application of the law to those persons who were not deemed disabled under conventional thought.

The lower courts explicitly ignored the clear call of Congress for a broad interpretation of disability under the ADA when it denied Wainscott the protection of the ADA. The narrow interpretation of disability placed upon by the lower courts cannot be reconciled with Congress' clear objective for an expansive definition.

CONCLUSION

The decisions of the lower courts to deny Petitioner protection under the ADA is inconsistent with EEOC's interpretation of the Act, cases from other circuits under the ADA, case law under the Rehabilitation Act and the legislative intent. Therefore, the Petition for Writ of Certiorari should be granted.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed April 1, 1999]

No. 98-5562

RICHARD WAINSCOTT	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
MEDUSA AGGREGATES COMPANY	)
	)
Defendant-Appellee.	)
	)

OPINION

BEFORE: SILER, DAUGHTREY and GILMAN, Circuit Judges.

RONALD LEE GILMAN, Circuit Judge. Richard Wainscott, a long-term employee of Medusa Aggregates Company, ceased working for the company in 1995 due to problems with his lower back. When Medusa denied his request for a job transfer because his impairment could not be reasonably accommodated, Wainscott filed suit under the Americans with Disabilities Act, 42 U.S.C. § 12112(a). The

district court granted summary judgment in favor of Medusa on the ground that Wainscott was not disabled as that term is defined in the statute. For the reasons set forth below, we **AFFIRM** the district court's decision.

I. BACKGROUND

Medusa operates a series of limestone quarries throughout the United States, including one in Butler, Kentucky where Wainscott was employed. Wainscott was hired in 1979. Shortly thereafter, he was assigned to work as a haul unit operator. The haul unit is a truck that is used to transport limestone after it is stripped from the walls of the quarry. Wainscott would collect the limestone and take it to the "crusher plant" at the facility, where the rock would be broken into smaller pieces. Because of the irregular surfaces in the quarry, Wainscott often experienced a rough ride on his repeated trips throughout the day. The parties agree that Wainscott's performance was satisfactory throughout his employment.

In March of 1995, Wainscott began experiencing lower back pain. Shortly thereafter, his wife informed the plant supervisor that Dr. Floyd Poore, Wainscott's personal physician, had determined that two of her husband's vertebrae were out of alignment. But Wainscott continued the performance of his duties without interruption. On October 25, 1995, however, Wainscott gave his supervisor a written statement from Dr. Poore advising Medusa that Wainscott should no longer drive the haul unit. Wainscott also missed five days of work at that time. Upon further inquiry from the company, Dr. Poore stated that Wainscott should be restricted from driving the haul unit, should avoid repetitive bending,

and should not lift over fifty pounds. Dr. Poore also was of the opinion that the restrictions were permanent.

To confirm Dr. Poore's diagnosis, Medusa had Wainscott examined by Dr. Gregory Snider. Dr. Snider found evidence of "lumbosacral strain," as well as abdominal pain for which he could find no obvious source. He recommended that Wainscott work no more than eight hours per day, five days per week, and that he be given a fifteen minute break after every two hours of driving. Although Dr. Snider initially thought that Wainscott's limitations were temporary, he later concluded that Wainscott had suffered a permanent five percent loss of function to his body as a whole.

Wainscott subsequently requested that he be allowed to return to work as a laborer. Tim Adkins, Medusa's safety director, sent Dr. Poore a job description and inquired whether Wainscott was capable of performing the laborer's job. Dr. Poore concluded that although Wainscott could perform the majority of the listed duties (11 out of 16), he would be unable to perform a number of the tasks that involved the moving or lifting of heavy objects. After reviewing Dr. Poore's recommendations, Medusa determined that Wainscott's request for the job transfer could not be accommodated. Wainscott has not returned to work since October of 1995.

In October of 1996, Wainscott filed suit in the United States District Court for the Eastern District of Kentucky, alleging violations of the Americans with Disabilities Act ("ADA") and a similar Kentucky statute, K.R.S. § 344.010 - .500. Medusa moved for summary judgment on the basis that

Wainscott was not disabled within the meaning of the ADA, was not "otherwise qualified" for the job he sought, and could not be reasonably accommodated. The district court granted summary judgment in favor of Medusa, finding that Wainscott was not disabled as defined by the ADA. Wainscott now appeals the district court's ruling as to his ADA claim. He makes no mention of his state-law cause of action.

II. ANALYSIS

A. Standard of review

We review *de novo* the district court's grant of summary judgment. *See, e.g., Smith v. Ameritech,* 129 F.3d 857, 863 (6th Cir. 1997). Summary judgment is appropriate when there are no issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. *See* FED. R. CIV. PRO. 56(C). In deciding a motion for summary judgment, the court must view the evidence and draw all reasonable inferences in favor of the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). The judge is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986). A genuine issue for trial is presented when there is sufficient "evidence on which the jury could reasonably find for the plaintiff" *Id* at 252.

B. Definition of "disability"

The ADA prohibits an employer from discriminating "against a qualified individual with a disability because of the disability of such individual." 42 U.S.C. § 12112(a). A person seeking relief under the ADA for termination must establish that he or she (1) is a disabled person within the meaning of the Act, (2) is qualified to perform the essential functions of his or her job with or without reasonable accommodation, and (3) has suffered an adverse employment decision because of such disability. *See Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1179 (6th Cir. 1996). Because the district court concluded that Wainscott had not established that he was a disabled individual within the meaning of the Act, it did not consider whether he was qualified to perform the essential functions of his job with or without accommodation, or whether he was discharged because of his alleged disability.

The essential issue on appeal is whether Wainscott is disabled. The ADA provides the following definition of disability:

> The term "disability" means, with respect to an individual--
>
> (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
> (B) a record of such an impairment; or
> (C) being regarded as having such an impairment.

42 U.S.C. § 12102(2). Wainscott does not claim to have a "record of [] impairment" or that he has been "regarded as having [] an impairment." We must therefore determine

whether Wainscott has "a physical or mental impairment that substantially limits one or more major life activities."

The ADA empowers the Equal Employment Opportunity Commission ("EEOC") to promulgate regulations that will further define the scope and reach of the statute. *See* 42 U.S.C. § 12116. The EEOC has defined "major life activity" to include the ability to work. *See* 29 C.F.R. § 1630.2(i). Wainscott contends that his back problems substantially limit this ability.

In deciding whether an individual is substantially limited in a major life activity, the courts should consider the nature and severity of the impairment, the duration of the impairment, and the expected impact of the impairment. *See Penny v. United Parcel Service,* 128 F.3 d 408, 414 (6th Cir. 1997). An ADA plaintiff must demonstrate that the injury in question significantly restricts his or her ability to perform either (a) a class of jobs or (b) a broad range of jobs within various classes. *See McKay v. Toyota Motor* Corp., 110 F.3d 369, 372 (6th Cir. 1997) ("An impairment that disqualifies a person from only a narrow range of jobs is not considered a substantially limiting one."). Although *McKay* does not attempt to define "class of jobs" or "narrow range of jobs," it found that McKay had proved only that she was unable to perform "the narrow range of assembly line manufacturing jobs that require repetitive motion or frequent lifting of more than ten pounds," but not the "class of jobs at issue, manufacturing jobs." *Id.*

The record clearly shows that Wainscott's condition does not significantly restrict his ability to perform either a class of jobs or a broad range of jobs in various classes as

compared to the average person having comparable training, skills, and abilities. As defined in *McKay,* the class of jobs at issue here is "manual labor." Wainscott's back condition has resulted in only a five percent loss of function to his body as a whole, a much more modest diminution of function than the one at issue in *McKay*. He remains capable of doing manual labor. Since he stopped working for Medusa, Wainscott has engaged in a number of physical activities, including raising and harvesting tobacco, repairing various engines, and doing odd jobs. Much like the plaintiff in *McKay,* Wainscott's evidence supports a conclusion that his impairment disqualifies him only from the narrow range, of jobs that require lifting more than fifty pounds, driving on rough surfaces, or bending repetitively.

Wainscott's injury is permanent, but the limitations in question are simply not severe enough to fall under the protection of the ADA. Although Wainscott's expert claims that Wainscott is precluded from performing "heavy strength capacity"jobs, the expert admits that this only disqualifies Wainscott from approximately 18,000 of the 110,000 jobs that he was able to perform before his injury. This is a "narrow range of jobs" as defined in *McKay*. In sum, Wainscott might be entitled to appropriate relief under the Kentucky Workers' Compensation Act (K.R.S. Chapter 342), but he is not so entitled under the ADA.

III. CONCLUSION

For the reasons set forth above, we **AFFIRM** the district court's grant of summary judgment in favor of Medusa.

APPENDIX B

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF KENTUCKY AT COVINGTON

[Filed April 7, 1999]

Civil Action No. 96-232

RICHARD WAINSCOTT	)
	)
Plaintiff,	)
	)
v.	)
	)
MEDUSA AGGREGATES COMPANY	)
	)
Defendant.	)

OPINION & ORDER

On March 26, 1998, oral argument was held in this matter. N. Jeffrey Blankenship and Randy J. Blankenship represented plaintiff; Donald B. Hordes and Toby Schisler represented defendant. The proceedings were recorded by official court reporter, Amy Blosser.

Factual Background

Defendant Medusa Aggregates Co. ('Medusa'), an Iowa corporation, is headquartered in Cleveland, Ohio, and

operates a series of limestone quarries throughout the United States, including a quarry in Butler, Kentucky ("Butler"). At its Butler facility, Medusa employs approximately thirty-nine hourly employees. (See Gividen dep., at p. 13). These employees are represented by the International Union of Operating Engineers Local 18. (See Wainscott dep., at p. 22, 78, exhibit # 5).

On April 16, 1979, Medusa hired Plaintiff Richard Wainscott and shortly thereafter assigned him to work as a 'haul unit" operator. (See Wainscott dep., at p. 24, exhibit # 2). A 'haul unit' is a truck used to transport limestone after it is stripped from the quarry walls. (See Gividen dep., at p. 54-56). As a haul unit operator, Mr. Wainscott's duties required him to drive the haul unit from the quarry pit to the various crusher plants located throughout the Butler quarry facility, at which machinery breaks the limestone into smaller sizes to meet customer demand. (See id. at p. 54-55). Due to the irregular surfaces throughout the quarry facility, Mr. Wainscott often experienced a rough ride when driving the truck. (See Wainscott dep., at p. 30). Nonetheless, the job required Mr. Wainscott to make repeated trips throughout the day. (See Wainscott dep., at p. 33-34). The parties agree that Mr. Wainscott satisfactorily performed his duties throughout his employment.

Mr. Wainscott began developing lower back problems in March 1995. On March 9, 1995, his wife called the plant supervisor, Richard Voyles, to inform him that Mr. Wainscott had two vertebrae out of alignment. (See Voyles dep., at p. 59, exhibit # J). The condition did not limit Mr. Wainscott in his employment because he continued to perform his duties, without complaint, until October 1995. (See Wainscott dep.,

at p. 50).

On October 25, 1995, Mr. Wainscott gave Mr. Voyles a written doctor's statement from Dr. Floyd G. Poore, his personal physician. (See Voyles dep., at p. 96). According to the statement, Mr. Wainscott suffered from recurring lower back pain and, as a result, could no longer drive the truck. (doc. #41, at exhibit # B). Dr. Poore suggested that Medusa change Mr. Wainscott's position to either 'mechanic's helper or service plant [worker]." (See id.). Additionally, the note indicated that Mr. Wainscott should be excused from work for five days. (See id.). Mr. Wainscott informed Mr. Voyles that he thought the injury was caused by the seat in his truck. (See Wainscott dep., at p. 50-51). Mr. Voyles made a note of this in Mr. Wainscott's personnel file, stating that Dr. Poore's note was not sufficiently informative to result in the change of Mr. Wainscott's job. (See Voyles dep., at exhibit # K). Additionally, he indicated that he told Mr. Wainscott that it may be necessary for him to visit Medusa's doctor. (See id.).

On October 30, 1995, Tim Adkins, Medusa's safety director, sent a note to Dr. Poore in which he requested additional information about Mr. Wainscott's limitations and asked whether the limitations were permanent or temporary. (See doc. # 40, at exhibit # C; doc. # 59, at exhibit # E). Dr. Poore responded by informing Mr. Adkins that Mr. Wainscott should not drive the truck because of the effect that the bouncing would have on his back, that he should not engage in repetitive bending, and that he should not lift over fifty pounds. (See doc. # 40, at exhibit #C; doc. # 59, at exhibit # E). Additionally, Dr. Poore informed Mr. Adkins that the restrictions placed on Mr. Wainscott were permanent. (See

id.)

To confirm Dr. Poore's diagnosis, Medusa had Mr. Wainscott examined by Dr. Gregory T. Snider, an occupational specialist at the Lexington Clinic in Lexington, Kentucky, on November 7, 1995. (doc. # 41, at exhibit # D (Report of Dr. Gregory T. Snider)). Based on that examination, Dr. Snider diagnosed Mr. Wainscott with lumbosacral strain and 'abdominal pain of undetermined etiology.' (See id. at ¶ 5). In his report, Dr. Snider recommended that Mr. Wainscott be limited to a five-day work week and an eight-hour work day. (See id. at ¶ 6). He also recommended that Mr. Wainscott be allowed to take 15 minute breaks after every two hours of driving. (See id.). Initially, Dr. Snider indicated that he did not think that Mr. Wainscott's restrictions would be permanent, but later he indicated that Mr. Wainscott suffered a permanent whole person impairment of five percent. (Snider dep., at p. 43-45).

In response to a request by Mr. Wainscott to return to work as a laborer, Tim Adkins, the defendant's safety director, sent Dr. Poore a detailed description of the laborer position in an effort to determine whether Mr. Wainscott could meet the physical requirements of the job. On July 9, 1996, Dr. Poor. reviewed the sixteen duties and indicated that Mr. Wainscott could not perform the following duties on the list:

5. **Moving water pumps** - Hooking/unhooking 6" and 8" high pressure water hoses. Standing, reaching, lifting up to 60 lbs.
6. **Moving water hoses** - Standing,

lifting, 6" and 8" high pressure hoses in 20' sections. Approximate weight: 95 lbs.

7. **Changing screens** - Standing, reaching, pulling, lifting weights up to 65 lbs.
8. **Sweeping and cleaning up inside buildings** - Standing, bending, lifting weighs up to 60 lbs.

* * * * *

14. **Cleaning under truck scales** - Standing, crawling, pulling, lifting weights up to 60 lbs. Shoveling to approximately 4 ½ feet overhead.

See doc. # 41, exhibit # I). Additionally, Dr. Poor. reiterated his previous restriction that Mr. Wainscott could not lift more than fifty pounds. Dr. Poor., however, indicated that Mr. Wainscott could perform the remaining duties, which included the following:

1. **Mowing with push mower** - Pushing/pulling 40 lb. mower up and down-uneven slopes.
2. **Trimming grass with weed eater** - Standing (sometimes in bent position), walking, carrying 12 lb. weed eater on uneven slopes.
3. **Shoveling under conveyors** - Standing, reaching, bending, lifting weights up to 30 lbs.
4. **Operating small utility loader (skid steer) for cleanup** - Climbing,

pushing, pulling controls.

* * * * *

9. **Assisting with conveyor repairs** - Standing, reaching, pulling, lifting weights up to 35 lbs.
10. **Washing under conveyors with water hoses** - Standing, lifting, carrying 20' sections of 2" water hoses. Approximate weight: 50 lbs.
11. **Steam cleaning and pressure washing equipment** - Standing, reaching, climbing.
12. **Painting** - Standing, reaching, climbing, lifting, carrying 20' extension ladder. Approximate weight: 50 lbs.
13. **Operat[ing] water truck** - Reaching, pulling, climbing, moving hoses, lifting weights up to 35 lbs. Traveling same roadways as haul trucks.

* * * * *

15. **Cleaning out wheel wash** - Standing, lifting, carrying 20' sections of 2" high pressure hoses• Approximate weight: 50 lbs.
16. **Filling in for vacancies in classified jobs** - Performs tasks in all other operations in and around quarry, up to and including driving the haul truck.

(See id.). After reviewing Dr. Poore's restrictions, Messrs. Zingales, Gividen and Voyles concluded that Mr. Wainscott could not be accommodated. (See Zingales dep., at p. 89).

Analysis

The Americans with Disabilities Act ("ADA") prohibits discrimination against 'a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C §12112 (a) (1995). The ADA places on covered employers the affirmative duty to "make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship . . . . " § 12112(b)(5)(A). In the instant case, Mr. Wainscott alleges that Medusa discriminated against him by failing to employ him as a laborer with weight and hour restrictions and by failing to allow him to return to his prior job as a haul unit operator with the restrictions suggested by Dr. Snider.

In order to prove discrimination, Mr. Wainscott must show: (1) that he is disabled; (2) that he is qualified for the job, with or without reasonable accommodation; and (3) that he was denied a reasonable accommodation. See Penny v. United Parcel Service, 128 F.3d 408, 414 (6th Cir. 1997)(citing Roush v. Weastec, Inc., 96 F.3d 840, 843 (6th Cir. 1996)). The first step in the analysis requires a determination that he has a disability covered by the ADA. See 42 U.S.C. § 12112(a)(1995). The ADA defines the term "disability" broadly to include three separate definitions:

> (A) a physical or mental impairment that substantially limits one or more of the major

> life activities of [an] individual;
> (B) a record of such an impairment; or
> (C) being regarded as having such an impairment.

See 42 U.S.C. § 12102(2)(1995); Penny, 128 F.3d at 414. Thus, under the statute, the first inquiry in the disability determination is whether Mr. Wainscott has a physical impairment that substantially limits one or more of his major life activities.

The Equal Employment Opportunity Commission ('EEOC") has defined "major life activities" to include functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, breathing and working. See 29 C.F.R. § 1630.2(i)(1997). The EEOC has also provided interpretive guidance explaining that the above list "is not exhaustive" and that 'other major life activities include, but are not limited to, sitting, standing, lifting, [and] reaching." 29 C.F.R. pt. 1630 app. at 350 (1997). Additionally, the EEOC's regulations define the phrase 'substantially limits' as follows:

> (i) Unable to perform a major life activity that the average person in the general population can perform; or (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1) (1997). In deciding whether an

individual is substantially limited in a major life activity, courts should consider the nature and severity of the impairment; the duration or expected duration of the impairment; and the permanent or long term impact, or expected permanent or long term impact, of the impairment. See Penny v. United Parcel Service, 128 F.3d 408, 414 (6th Cir. 1997) (citing 29 C.F.R. § 1630.2(j) (2)).

With respect to the major life activity of working, term substantially limits means significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.' 29 C.F.R. § 1630.2(j) (3) (i) (1997). "The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." 29 C.F.R. § 1630.2(j)(3)(i) (1997). The Sixth Circuit has added that '[a]n impairment that disqualifies a person from only a narrow range of jobs is not considered a substantially limiting one." McKay v. Toyota Motor Manufacturing, 110 F.3d 369, 373 (6th Cir. 1997) (quoting Farmland Foods, 58 F.3d 382, 386 (8th Cir. 1995)). See also Curry v. Empire Berol, U.S.A, No. 97-5012, 1998 WL 13407, at * 3 (6th Cir. Jan. 7, 1998)(unpublished)(finding no disability in case in which the plaintiff was found not to be limited in 'any way in his ability to perform his work."); Szalay v. Yellow Freight System, Inc., No. 96-3789, 1997 WL 650915 (6th Cir. Oct. 16, 1997(unpublished)(finding no disability in a case in which the plaintiff suffered from a knee injury); Hall v. Shelby County Government, No. 96-6506, 1997 WL 468328, at * 2 (6th Cir. Aug. 13, 1997)(unpublished)(applying the above definition to a failure to hire case).

In McKay v. Toyota Motor Manufacturing, 110 F.3d 369 (6th Cir. 1997), the Sixth Circuit addressed disability discrimination in the context of an alleged substantial limitation in the "major life activity" of working. The McKay case rested on facts similar to those presented by Wainscott. See McKay, 110 F.3d at 370-371. The plaintiff in that case was diagnosed with carpal tunnel syndrome and muscle inflammation. Her doctor placed physical restrictions on her, including a lifting restriction of a maximum of twenty pounds, a restriction on the use of vibrating tools, and a restriction on repetitive use of her right hand. Eventually, she was terminated for excessive absences. See id. at 371. The Sixth Circuit reviewed the facts and concluded that the plaintiff was not disabled. See id. at 373. Specifically, the court held that light of the regulatory framework of the ADA, we hold that the physical restrictions caused by plaintiff's disability do not significantly restrict her ability to perform the class of jobs at issue, manufacturing jobs; at best, her evidence supports a conclusion that her impairment disqualifies her from only the narrow range of assembly line manufacturing jobs that require repetitive motion or frequent lifting of more than ten pounds." Id. According to the court, McKay's limited impairment did not significantly restrict her ability to perform a broad range of jobs in various classes. See id.

In Penny v. United Parcel Service, 128 F.3d 408 (6th Cir. 1997), the Sixth Circuit reviewed another case factually similar to the one at hand. In that case, the plaintiff, a delivery driver, suffered several injuries to his back and shoulder that left him with a permanent functional impairment of ten to twenty percent of the whole body. See id. at 416. One of his treating physicians stated that he could walk no more than one block without rest and that he could run for

only fifteen minutes at a slow pace. See id. Another physician suggested that he not lift more than twenty-five pounds on a repetitive basis. See id. As a result of his impairment, the plaintiff claimed that he was disabled under the ADA because he was substantially limited in the major life activity of walking. See id. at 414. The Sixth Circuit reviewed the facts and concluded that the plaintiff was not disabled. See id. at 415.

Numerous courts, including this one, have ruled similarly in cases involving plaintiffs with claims that they are substantially limited in a major life activity due to back impairments or lifting restrictions. See Schneider v. Chas. Seligman Distributing Co., F. Supp., No. 96-208, 1998 WL 113471 (E.D. Ky. Mar. 4,1998). See also Halperin v. Abacus Technology Corp., 128 F.3d 191, 200 (4th Cir. 1997)(holding that a plaintiff with back impairment resulting in a lifting restriction of twenty pounds was not disabled); Williams v. Channel Master Satellite Sys. Inc., 101 F.3d 346, 349 (4th Cir. 1996) cert. denied sub nom. Williams v. Avnet, Inc., 117 S. Ct. 1844 (1997) (holding that a twenty-five pound lifting limitation did not constitute a 'significant restriction on one's ability to lift, work, or perform any other major life activity."); Sherrod v. American Airlines, Inc., 132 F.3d 1112, 1120 (5th Cir. 1998)(holding that a plaintiff with a forty-five pound maximum weight lifting restriction due to a neck injury was not disabled); Harrington v. Rice Lake Weighing Systems, Inc., 122 F.3d 456, 460 (7th Cir. 1997)(holding that a plaintiff with a neck injury and temporary lifting restriction was not regarded as disabled, in part, because he did not show that he was substantially limited in his ability to work); Snow v. Ridgeview Medical Center, 128 F.3d 1201 (8th Cir. 1997)(holding that a plaintiff with a

back injury who was restricted from lifting more than twenty-five pounds was not disabled 'where there [was] no evidence that she [was] thereby precluded from performing a class or broad range of jobs as compared to average persons in the general population."); Heintzelman v. Runyon, 120 F.3d 143, 145 (8th Cir. 1997)(holding that a plaintiff with a back impairment and restrictions was not disabled); Thompson v. Holy Family Hosp., 121 F.3d 537, 540-41 (9th Cir. 1997)(holding that plaintiff with a back impairment and a limit of twenty-five pounds for continuous lifting was not substantially limited in her ability to lift).

Like the plaintiffs in McKay and Penny, Mr. Wainscott's impairment does not rise to the level of disability within the meaning of the ADA. See Penny, 128 F.3d at 415; McKay 110 F.3d at 373. In fact, Mr. Wainscott's impairment appears to be even less restrictive than either of the plaintiffs discussed in those cases. See id. at 371; Penny, 128 F.3d at 416. At the time he requested an accommodation, Mr. Wainscott could lift up to fifty pounds and suffered from a permanent impairment of the whole body of only five percent. (See Snider dep., p. 43-45).

Even with the new weight restriction of twenty-five pounds, he remains capable of performing manual labor. He has undertaken several physical activities since his injury, including raising and harvesting tobacco, repairing various engines, and doing odd jobs. (See Wainscott dep., at p. 10-11, 170-184). Although Mr. Wainscott's experts suggest that he is precluded from doing jobs classified as requiring "heavy strength capacity" or greater, his own expert indicates that he is only disqualified from only 18,000 of the 111,000 jobs that he would have been qualified to perform had he not been

injured. (See Roebker dep., at p. 84). Thus, Mr. Wainscott's impairment appears to disqualify him from only the narrow range of jobs that require him to lift more than fifty pounds, bend repetitively, and drive a 'haul unit' over rough terrain. See McKay, 110 F.3d at 373 (Hillman, dissenting)(noting that McKay's expert testified that her impairment 'disqualifies her from performing all heavy duty jobs, all medium duty jobs, as well as those light and sedentary jobs requiring repetitive motion.'). Accordingly, Mr. Wainscott's impairment is not a disability under ADA.

Additionally, Mr. Wainscott claims that he has a 'record of such an impairment' and, accordingly, is disabled within the meaning of the ADA. As noted above, a plaintiff can establish a disability within the meaning of the ADA if he can show that he has a 'record of such an impairment.' 42 U.S.C. § 12102(2)(B). According to the regulations, the phrase '[h]as a record of such impairment' means that the plaintiff "has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.' 29 C.F.R. § 1630.2(k). Mr. Wainscott also claims that Medusa has 'regarded [him] as having such an impairment,' and for that reason, he is disabled under the ADA. 42 U.S.C. § 12102(2)(B). According to the regulations, the phrase 'regarded as having such an impairment' means that the plaintiff:

> (1) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a covered entity as constituting such limitation; (2) Has a physical or mental impairment that substantially limits major life activities only as a result of the

> attitude of others toward such impairment; or (3) Has none of the impairments defined in paragraphs (h) (1) or (2) of this section but is treated by a covered entity as having a substantially limiting impairment.

29 C.F.R § 1630.2(1). Thus, the plaintiff must establish that he has a record of an impairment that substantially limits him in a major life activity or that he is regarded as being substantially limited in a major life activity. See Curry v. Empire Berol, U.S.A., No. 97-5012, 1998 WL 13407, at * 3 (6th Cir. Jan. 7, 1998)(unpublished); Ballard v. Vulcan Materials Co., 978 F. Supp. 751, 756 (W.D. Tenn. 1997)("a plaintiff bears the burden of establishing that the defendant regarded him as suffering from a physical or mental impairment that significantly restricted his ability to perform 'either a class of jobs or a broad range of jobs in various classes.'"). Mr. Wainscott can do neither, however, because his back injury does not substantially limit him in a major life activity.

However, even assuming that Mr. Wainscott is "regarded as having such an impairment" or has a "record of such an impairment," he is still unable to survive summary judgment on his discrimination claim. Because the basis of his claim is the denial of an accommodation, the perception of his employer is simply irrelevant. An employer is not required to accommodate an employee who is not actually disabled. See Gilday v. Mecosta County, 124 F.3d 760, 764 n.4 (6th Cir. 1997)("That such a person could request accommodation means that he is actually physically disabled under the Act, and not merely considered to be disabled or have a record of disability, . . .[because] [a] person without

an actual disability would not need any accommodation."). Accordingly, Mr. Wainscott's ADA claim must fail.

Having concluded that plaintiff is not disabled, it is unnecessary to address the issue of reasonable accommodation.

Therefore, the court having heard counsel and being advised, **IT IS ORDERED** as follows:

1. That Defendant's motion for summary judgment (Doc. #41) be, and it is, hereby **granted**, pursuant to the reasoning of the United States Court of Appeals for the Sixth Circuit in Penny v. United Parcel Service, 128 F.3d 408, 414-418 (6th Cir. 1997), and McKay v. Toyota Motor Manufacturing , 110 F.3d 369, 371-374 (6th Cir. 1997); and

2. That a separate Judgment shall enter concurrently herewith.

This 7th day of April, 1998.

/s/_____
WILLIAM O. BERTELSMAN,
CHIEF JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF KENTUCKY AT COVINGTON

[Filed April 7, 1999]

Civil Action No. 96-232

RICHARD WAINSCOTT	)
	)
Plaintiff,	)
	)
v.	)
	)
MEDUSA AGGREGATES COMPANY	)
	)
Defendant.	)

JUDGMENT

Pursuant to the Opinion and Order entered concurrently herewith, the court being advised,

IT IS ORDERED AND ADJUDGED that judgment is hereby entered in favor of the defendant; that this matter is hereby dismissed, with prejudice, at the cost of the plaintiff; and stricken from the docket of this court.

This 7TH day of April, 1998.

/s/_____

WILLIAM O. BERTELSMAN, CHIEF JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed April 26, 1999]

No. 98-5562

RICHARD WAINSCOTT	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
MEDUSA AGGREGATES COMPANY	)
	)
Defendant-Appellee.	)
	)

MANDATE

Pursuant to the court's disposition that was filed 4/1/99 the mandate for this case hereby issues today.

A True Copy.

COSTS: NONE

Filing Fee ..... $
Printing ..... $

Total ..... $

Attest
Ms. Patricia J. Elder Deputy Clerk